

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

Supreme Court No._____

Court of Appeals No. 332307

Lower Court No.14-000230-FC

ANTJUAN PIERRE JACKSON

Defendant-Appellant

KALAMAZOO COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

JACQUELINE C. OUVRY (P71214)

Attorney for Defendant-Appellant

APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

STATE APPELLATE DEFENDER OFFICE

BY: JACQUELINE C. OUVRY (P71214)

Assistant Defender

3300 Penobscot Building

645 Griswold

Detroit, Michigan 48226

(313) 256-9833

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN

Supreme Court No. _____

Plaintiff-Appellee

Court of Appeals No. 332307

-vs-

Lower Court No. 14-000203-FC

ANTJUAN PIERRE JACKSON,

Defendant-Appellant.

_____ /

CERTIFICATE OF SERVICE

TO:

**PROOF OF SERVICE
CLERK'S OFFICE**

State of Michigan Office
Building □ 350 Ottawa,
N.W. □ Grand Rapids, MI
49503

**PROOF OF SERVICE
CLERK'S OFFICE**

Kalamazoo Circuit Court
County Building
227 West Michigan
Avenue
Kalamazoo, MI 49007

**KALAMAZOO COUNTY
PROSECUTOR**

County Building
227 West Michigan Avenue
Kalamazoo, MI 49007

Jacqueline Ouvry, attorney at law, says that on September 19, 2017, she sent one copy of the following:

**APPLICATION FOR LEAVE TO APPEAL
CERTIFICATE OF SERVICE**

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Jacqueline Ouvry
JACQUELINE OUVRY (P 71214)
Assistant Defender
3300 Penobscot Building
645 Griswold, Detroit MI 48226
313-256-9833

September 19, 2017

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	i
JUDGMENT APPEALED FROM AND RELIEF SOUGHT	ii
STATEMENT OF QUESTION PRESENTED.....	iv
STATEMENT OF FACTS.....	1
I. Mr. Jackson was sentenced on the basis of an inaccurate sentencing guidelines range and in violation of his right to due process where Offense Variable 13 was incorrectly scored; therefore, resentencing is required.	4
SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT	10

INDEX OF AUTHORITIES

Cases

<i>People v Babcock</i> , 496 Mich 247 (2003).....	9
<i>People v Butler</i> , 865 NW2d 29 (2015)	iii, iv, 4, 7
<i>People v Francisco</i> , 474 Mich 82 (2006)	5, 9
<i>People v Hardy</i> , 494 Mich. 430, 835 N.W.2d 340 (2013).....	iii, 4, 7
<i>People v Johnson</i> , 485 Mich 932 (2009)	5, 6
<i>People v Lockridge</i> , 498 Mich 358 (2015)	5, 9
<i>Townsend v Burke</i> , 334 US 736; 68 S Ct 1252 (1948)	4

Constitutions, Statutes and Court Rules

US Const Amends V, XIV	5
Mich Const 1963, art 1, §17.....	5
MCL 333.7403(2)(a)(iv)	6
MCL 750.530.....	1
MCL 777.19(3)(b).....	7
MCL 777.43(1)(b).....	5
MCL 777.43(1)(c).....	ii, 5, 7
MCL 777.43(1)(d).....	6
MCL 777.43(2)(a).....	ii, 5, 7
MCL 777.43(2)(c).....	6
MCR 6.310(C)	3
MCR 7.205(G)(3)	3

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant, Antjuan Jackson moves for leave to appeal the July 25, 2017 Opinion of the Court of Appeals affirming sentence after remand from this Court. See *Court of Appeals Opinion*, attached as *Appendix A*. The Court of Appeals decision to deny resentencing is clearly erroneous because it ignores a decision of this Court and the denial of resentencing will cause material injustice.

Mr. Jackson asserts that error occurred in scoring OV 13 (Continuing Pattern of Criminal Behavior) because his misdemeanor convictions for attempted resisting and obstructing offenses from 2010 and 2011 would be treated as felonies in order to assess Mr. Jackson 25 points under OV 13. The statute requires the assessment of points for “felonious criminal activity” and misdemeanor activity is not felonious activity. MCL 777.43(1)(c). The instructions for the variable require the sentencing court to look at acts, “without regard to whether the offense resulted in conviction.” MCL 777.43(2)(a). The Court of Appeals Opinion ignores both the statutory instructions and the decision of this Court in *People v Butler*, 865 NW2d 29 (July 1, 2015) to reach this conclusion.

In *Butler, supra*, this Court remanded for resentencing where out-of-state charges were used to assess points under OV 13 without any additional factual support. The Court noted “[b]efore any such alleged crimes may be used to score OV 13, the prosecutor must prove by a preponderance of the evidence that the crimes actually took place, that the defendant committed them, that they were properly classified as felony ‘crimes against a person,’ MCL 777.43(1)(c), and that they occurred ‘within a 5-year period’ of the sentencing offense, MCL 777.43(2)(a). See *People v Hardy*, 494 Mich. 430, 835 N.W.2d 340 (2013).”

Here, as in *Butler*, the record lacks factual support that the acts underlying the misdemeanor conviction amounted to felonious activity.

Had OV 13 been properly scored at zero points, Mr. Jackson's OV total would be 45 points. This change moves Mr. Jackson from a D-V cell to a D-IV cell with a corresponding range of 36 to 71 months. The sentence imposed is now outside the correct range.

For these reasons, Defendant-Appellant asks that this Honorable Court grant his application for leave to appeal and/or remand for a full resentencing.

STATEMENT OF QUESTION PRESENTED

- I. Was Mr. Jackson was sentenced on the basis of an inaccurate sentencing guidelines range and in violation of his right to due process where Offense Variable 13 was incorrectly scored; therefore, is resentencing required?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Mr. Jackson appeals seeking resentencing based on error in the scoring of Offense Variable (OV) 13 where the sentencing court failed to determine whether the activity underlying the prior criminal acts was actually felonious activity. This Court previously remanded Mr. Jackson's appeal to the Court of Appeals as on leave granted. In a July 25, 2017 Opinion, the Court of Appeals denied resentencing.¹ Mr. Jackson now seeks leave to appeal.

The Charges and Plea

Mr. Jackson pled guilty to unarmed robbery, MCL 750.530, in Kalamazoo County Circuit Court on September 30, 2014. The charges arose from a robbery on January 20, 2014 at an apartment where marijuana and money were taken from several women. On October 30, 2014, the Honorable J. Richardson Johnson sentenced Mr. Jackson to a term of eight years to 22 years, six months imprisonment. *Judgments of Sentence, Appendix B.*

Mr. Jackson entered his plea following a jury trial resulting in acquittals of two counts of felony firearm and a hung jury on two counts of armed robbery. He entered that plea in exchange for dismissal of two counts of armed robbery and a habitual fourth offender sentence enhancement (using instead the habitual second offender enhancement). The parties agreed not to score Prior Record Variable (PRV) 7. *Plea transcript*, (PL) 20, 21. Additionally, the trial court indicated that it would sentence within the sentencing guidelines. PL 22.

The Sentence: The Objection and Error in OV 13

The sentencing hearing began on October 27, 2014 with defense counsel's objections to the scoring of OV 1, 2 and 13. *Sentencing transcript, Oct. 27, 2014*, (ST1) 4. Counsel objected to the scoring of OV 1 at 15 points because Mr. Jackson was acquitted of the felony firearm charges

¹ See *Appendix A.*

and entered his plea to unarmed robbery. ST1 4. Counsel noted that the instructions require that co-defendants receive the same number of points but argued that points were assessed in error in the co-defendant's case as well. ST1 5. The court determined that 15 points were appropriate for each defendant. ST1 7. Counsel objected to OV 2 for the same reasons and the court ruled against the objection. ST1 8.

Counsel next objected to the points assessed under OV 13, arguing that looking back five years from the sentencing offense, Mr. Jackson's criminal history did not reflect an additional three scoreable felonies. ST1 9. The prosecutor argued that two prior convictions for attempted resisting and obstructing a police officer (from 2010 and 2011) could support scoring OV 13 because they were convictions for attempted felonies. ST1 12. The court adjourned sentencing to receive additional briefing as to OV 13.

The parties returned on October 30, 2014. Defense counsel asserted that the two convictions for attempt resisting and obstructing were "fundamentally...misdemeanor conviction[s]." *Sentencing transcript, October 30, 2014* (ST2) 4. Further, that the guidelines instructions would not require this attempted felony to be treated as a felony because the guidelines do not apply to the offense of attempted resisting and obstructing and because by its maximum penalty of less than one year attempt resisting and obstructing is a misdemeanor. ST2 5. The prosecutor asked the court to treat attempt resisting and obstructing as a felony because it is an attempted felony and because "the behavior for an attempt R and O would essentially be the same type of behavior that you're looking at for a resisting and obstructing." ST2 8.

The court overruled defense counsel's objection. The court noted that it could not include a prior unarmed robbery in assessing points under OV 13 because that offense fell outside the five year period. ST2 10. The court acknowledged that there was a prior offense for resisting and

obstructing which would create two felonies for consideration with the sentencing offense but that the issue as to the score was the inclusion of attempt resisting and obstructing convictions from 2010 and 2011. ST2 10. The court indicated that it found an unpublished Court of Appeals opinion persuasive – *People v Mosher, Docket No. 312996, released January 23, 2014. Mosher Opinion, Appendix C*. There the Court found that attempt resisting and obstructing is classified as a Class H felony. Thus, the trial court concluded that 25 points were appropriately assessed under OV 13 and the resulting sentencing guidelines range was 43 to 107 months. ST2 12.

The Appeal

Mr. Jackson requested the appointment of appellate counsel which was granted. Appointed appellate counsel (Nicholas Bostic) failed to file any pleadings within the six month deadlines allowed under MCR 6.310(C), and MCR 7.205(G)(3) but only filed a motion to withdraw as counsel on August 5, 2015. *Motion to Withdraw, Appendix D*. The motion to withdraw was granted and substitute appellate counsel (State Appellate Defender Office) appointed on September 11, 2015. *Order of Appointment, Appendix E*.

Mr. Jackson filed a delayed application which was denied in an Order. *Court of Appeals Order, Appendix F*. Mr. Jackson appealed.

Relief

Presently incarcerated, Mr. Jackson asks this Honorable Court to remand for resentencing.

- I. Mr. Jackson was sentenced on the basis of an inaccurate sentencing guidelines range and in violation of his right to due process where Offense Variable 13 was incorrectly scored; therefore, resentencing is required.**

Issue Preservation

Mr. Jackson preserved this issue with counsel's objection at the time of sentencing, which the trial court overruled. ST2 12.

Standard of Review

This Court clarified the standard applicable to review of the sentencing guidelines in

People v Hardy:

As we have explained before, the abuse of discretion standard formerly predominated in sentencing review. But when the Legislature enacted the sentencing guidelines in 1998, it prescribed detailed instructions for imposing sentences, thereby reducing the circumstances under which a judge could exercise discretion during sentencing. Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. *People v Hardy*, 494 Mich 430, 438 (2013).

Argument

Mr. Jackson asserts that he is entitled to resentencing because his sentence was based on inaccurate information, namely the scoring of Offense Variable (OV) 13. The evidence does not support the score where Mr. Jackson did not have the three requisite felonies within five years. Under *Francisco, supra*, an error in scoring the sentencing guidelines is inaccurate information and a sentence based on inaccurate information is invalid. *Francisco, supra*, at 89-90.

The federal and state constitutional rights to due process require sentencing only on the basis of accurate information. *Townsend v Burke*, 334 US 736; 68 S Ct 1252; 92 L Ed 2d 1690

(1948); *People v Francisco*, 474 Mich 82, 86 (2006). US Const Amends V, XIV; Mich Const 1963, art 1, §17.

Defendant acknowledges that in *People v Lockridge*, 498 Mich 358 (2015) this Court found that the sentencing guidelines were unconstitutional where they required judicial fact-finding on the offense variables and that the remedy for the constitutional violation would be advisory sentencing guidelines. But, the Court was clear that the sentencing guidelines remain a “highly relevant consideration” that sentencing courts must take in to account. *Lockridge*, *supra* at 391. Thus, Mr. Jackson is entitled to accurate scoring of the sentencing guidelines, which did not occur here. Therefore, resentencing is required.

The Error in Scoring OV 13

The Department of Corrections assessed 25 points in this case for OV 13. *Sentencing Information Report*, attached as *Appendix G*. The “Continuing Pattern of Criminal Behavior,” requires the assessment of 25 points when “[t]he offense was part of a pattern of felonious criminal activity involving three or more crimes against a person.” MCL 777.43(1)(c).² Additionally, the instructions require that “all crimes within a five-year period, *including the sentencing offense*, must be counted, without regard to whether the offenses resulted in a conviction.” MCL 777.43(2)(a) (emphasis in the original).

Only those offenses committed during a five-year period that encompasses the sentencing offense may be considered in the scoring of OV 13. *People v Francisco*, 474 Mich 82, 86 (2006); *People v Johnson*, 485 Mich 932 (2009).

² The record contains no allegations that MCL 777.43(1)(b) applies, which requires 25 points for offenses related to gang activity.

In this case, the sentencing offense occurred on January 20, 2014. *Id.* This Court can note that a five-year period extending back from the sentencing offense would end at January 20, 2009.

The only offenses listed in Mr. Jackson's criminal history occurring between January 20, 2014 and January 20, 2009 are: 1) January 20, 2014, an additional count of armed robbery (crime against a person) dismissed as part of the plea agreement in the instant case, 2) May 17, 2013, Possession of less 25 grams of certain controlled substances (controlled substance offense) and resisting and obstructing (crime against a person); 3) March 5, 2011 attempt resisting and obstructing an officer, (misdemeanor against a person); and 4) November 18, 2010 attempt resisting and obstructing an officer (misdemeanor against a person).

The Court can see that the additional armed robbery charged was used to assess points under OV 12, contemporaneous felonious criminal acts and thus, cannot be use in OV 13. *Appendix G*; MCL 777.43(2)(c). And, the controlled substance offense committed on May 17, 2013 is not one of the controlled substance offenses which may be counted toward a ten point score under MCL 777.43(1)(d); MCL 333.7403(2)(a)(iv). Thus, with the sentencing offense and the 2013 resisting and obstructing, Mr. Jackson had two felony convictions within the five year period which could be counted toward OV 13. ST2 10.

The only issue of dispute arose regarding whether the attempt resisting and obstructing offenses from 2010 and 2011 would be considered felonies in order to assess Mr. Jackson 25 points under OV 13.

Defense counsel argued that attempt resisting and obstructing is by its terms a misdemeanor because the maximum penalty is not more than one year. The prosecutor argued that the variable could be scored because the attempted offense could be characterized as a

felony within the definitions of felony in the sentencing guidelines. See MCL 777.19(3)(b) (attempt to commit a class G felony is a class H offense). The trial court found this argument (also addressed by the Court of Appeals in *People v Mosher*, supra) persuasive.

The issue, however, is not whether the offense is a felony for purposes of scoring the guidelines for a sentencing offense but rather, whether the act committed is itself felonious (an issue which the opinion in *Mosher* did not address). *Appendix C*. The statute requires the assessment of points for “felonious criminal activity” and misdemeanor activity is not felonious activity. MCL 777.43(1)(c). The instructions for the variable require the sentencing court to look at acts, “without regard to whether the offense resulted in conviction.” MCL 777.43(2)(a).

The sentencing court may not infer felonious criminal activity that is not in the record. This Court recently remanded for resentencing in a case where out-of-state charges or accusations were used to score OV 13 without any additional factual support. The Court noted “[b]efore any such alleged crimes may be used to score OV 13, the prosecutor must prove by a preponderance of the evidence that the crimes actually took place, that the defendant committed them, that they were properly classified as felony ‘crimes against a person,’ MCL 777.43(1)(c), and that they occurred ‘within a 5-year period’ of the sentencing offense, MCL 777.43(2)(a). See *People v Hardy*, 494 Mich. 430, 835 N.W.2d 340 (2013).” *People v Butler*, 865 NW2d 29 (July 1, 2015). The Court of Appeals ignored *Butler* in its Opinion in this case.

On this record, the actions of Mr. Jackson in 2010 and 2011 are not known. The only thing known is that those actions did not rise to the level of a felony conviction - Mr. Jackson was convicted of attempted resisting and obstructing and penalized for a misdemeanor. And, in both the 2010 and 2011 attempt resisting and obstructing cases, Mr. Jackson was not even

charged with the felony resisting and obstructing. He was charged with attempt (the misdemeanor) from the outset.

NO. 7 OF 10

Offense Date:	11/18/2010
Status at Time of Offense:	Probation
Arrest Date:	01/25/2011
Arresting Agency:	Kalamazoo Dept. of Public Safety
Charge(s) at Arrest:	Attempted R&O PO
Court of Jurisdiction:	8th Dist. Ct.
Final Charges:	Attempted R&O PO(M) Scored
Conviction Date/Method:	02/08/2011 / Plea
Sentence/Disposition:	15 Days Jail
Sentence Date:	02/08/2011
Attorney Present:	Waived
Discharge Date:	Unknown
Notes:	

NO. 8 OF 10

Offense Date:	03/05/2011
Status at Time of Offense:	Probation
Arrest Date:	03/23/2011
Arresting Agency:	Kalamazoo Dept. of Public Safety
Charge(s) at Arrest:	Ct 1-Attempted R&O PO, Ct 2-C/S-Poss. of Marijuana, Ct 3-DWLS
Court of Jurisdiction:	8th Dist. Ct.
Final Charges:	Ct 1-Attempted R&O PO(M) Scored, Ct 3-DWLS(M) Not Scored
Conviction Date/Method:	05/25/2011 / Plea
Sentence/Disposition:	1 Year Probation, 15 days Jail
Sentence Date:	05/25/2011
Attorney Present:	Yes
Discharge Date:	08/17/2012
Notes:	Successful discharge from probation.

See *Excerpt from PSIR, page 6, Appendix H*. Thus, the sentencing court erred by inferring felonious criminal activity here.

For these reasons, OV 13 should be scored at zero points.

Resentencing is Required

Mr. Jackson received a total of 40 PRV points and 70 OV points. These scores place Mr. Jackson in a D-V cell for his conviction. *Appendix G*. The corresponding guidelines range for that cell is 43 to 107 months, as used by the trial court at sentencing. *Sentencing Grid for Class C Offenses*, attached as *Appendix I*.

Had OV 13 been properly scored at zero points, Mr. Jackson's OV total would be 45 points. This change moves Mr. Jackson from a D-V cell to a D-IV cell with a corresponding range of 36 to 88 months. *Appendix I*.

The 96 month (8 year) minimum sentence imposed is outside the corrected range, without any reasons for departure. *People v Babcock*, 496 Mich 247, 264-265, 274 (2003); *Lockridge supra*.

The error in the guidelines scoring violates Mr. Jackson's right to be sentenced based on accurate information. *Francisco, supra*. Resentencing is required.

SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court to remand for resentencing or any other appropriate relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Jacqueline Ouvry
BY: _____
JACQUELINE OUVRY (P71214)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: September 19, 2017